IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BEFORE THE ARBITRATION PANEL

REGAL COAL, INC.,
and VIRGIL D. LAROSA,

Plaintiffs,

v.

CIVIL ACTION NO. 2:03-CV-90
(Judge Joseph R. Goodwin)

DOMINICK LAROSA, and
RESEARCH FUELS, INC.,

Defendants,

and

COURTNEY F. FOOS COAL CO., INC.,
Intervenor,

and

DOMINICK LAROSA, RESEARCH FUELS, INC.,
ENERGY MARKETING COMPANY, INC. and
CREDIBLE, INC.,

Third-Party Plaintiffs,

v.

CHEROKEE PROCESSING, INC., and
COURTNEY F. FOOS COAL CO., INC.,

Third-Party Defendants.

MEMORANDUM OPINION AND FINAL AWARD OF THE ARBITRATION PANEL

I. JURISDICTION AND PROCEDURAL HISTORY

The Arbitration Panel consisting of the Honorable Thomas E. McHugh, Christopher B. Power and F. Thomas Rubenstein (hereinafter collectively referred to as "Panel") has jurisdiction to hear and decide this matter pursuant to that certain Settlement Agreement made the 23rd day of September, 2005 (hereinafter "Settlement Agreement"), between and among Plaintiffs, Regal Coal, Inc. (a company owned and controlled by Virgil David LaRosa, hereinafter referred to as "Regal") and Virgil David LaRosa (hereinafter referred to as "Virgil D."), Defendants, Dominick LaRosa (hereinafter referred to as "Dominick") and Research Fuels, Inc. (a company owned and controlled by Dominick, hereinafter referred to as "Research"), Intervenor and Third-Party Defendant Courtney F. Foos Coal Co., Inc. (hereinafter referred to as "Foos Coal"), Third-Party Plaintiffs Energy Marketing Company, Inc. (a company owned and controlled by Dominick, hereinafter referred to as "EMC") and Credible, Inc. (a company owned and controlled by Dominick, hereinafter referred to as "Credible") and Third-Party Defendant Cherokee Processing, Inc. (a company owned and controlled by Virgil D., hereinafter referred to as "Cherokee"), Roblee Coal Company, Bishoff Brothers, Inc. and Courtney F. Foos, Jr.[1] As part of the Settlement Agreement, the Defendants and Third-Party Plaintiffs agreed to release and

[1] A written transcript of the proceedings before the Panel was prepared which includes a record of all exhibits admitted into evidence. In this Memorandum Opinion and Award, references to the transcript shall be indicated by the letters "TR" and the applicable page number, and references to exhibits shall be identified by the entity which introduced the exhibit and the applicable exhibit number (e.g., "Plaintiff's Exhibit 1"). The Settlement Agreement was made Panel Exhibit 1 in this proceeding. The Panel expresses its sincere appreciation to Court Reporter Kathryn S. Little, CCR for her services throughout this proceeding which encompassed 47 days of testimony conducted over 13 months. The Panel also expresses its sincere appreciation to Legal Assistant Maryann Cipollone for her invaluable assistance to the Panel throughout the proceedings. The Panel further expresses its deep appreciation to the Honorable John S. Kaull, United States Magistrate Judge for the U.S. District Court for the Northern District of West Virginia for his assistance to the Panel with discovery disputes and related matters during the arbitration process.

dismiss with prejudice their claims against Roblee Coal Company, Bishoff Brothers, Inc. and Courtney F. Foos, Jr., leaving Regal, Virgil D., Dominick, Research, Foos Coal, EMC, Credible and Cherokee as the parties to this arbitration proceeding (collectively hereinafter referred to as "Parties").[2] In addition to the Settlement Agreement, the Parties also entered into that certain "Arbitration Protocol" (Panel Exhibit 4) to govern the arbitration proceeding before the Panel.

II. ISSUES AND ANALYSIS

A. THE ARRANGEMENT AMONG THE PARTIES, 2001-2005

Dominick, through his company EMC, acquired either an ownership or lease interest in certain coal properties and associated permits known as the "Rauer" property (hereinafter referred to as the "EMC Property") by being the successful bidder in a United States Bankruptcy Court proceeding in the Fall of 1995. While Virgil D. and Dominick disagree concerning when, the Panel finds that in late 2000 or early 2001, as hereinafter further discussed and decided, Dominick and Virgil D. agreed to pursue an arrangement regarding the development, mining,

[2] The underlying civil action was filed by Virgil David LaRosa and Regal Coal, Inc. on October 16, 2003 in the United States District Court for the Northern District of West Virginia (hereinafter referred to as the "Civil Action"). The following matters from the Civil Action are noted for chronological points of reference with respect to the Panel's analysis of the issues brought before it in this proceeding. On November 17, 2003, Regal and Virgil D. filed a Motion for Preliminary Injunction and Memorandum in Support of Motion. Regal and Virgil D. filed an Amended Complaint with the Court on November 20, 2003, seeking declaratory relief, injunctive relief, relief for breach of contract/unjust enrichment, relief for tortious interference with the right to contract, relief for intentional infliction of emotional distress, relief for fraud and for quantum merit. On May 4, 2004, Defendants Dominick and Research filed their *Motion for [sic] to Enjoin the Plaintiffs from the Continued Occupation of Real Property and Utilization of Coal Mining Permits Issued by the West Virginia Division Of Environmental Protection and Incorporated Memorandum Of Law.* On May 21, 2004, Plaintiffs Regal and Virgil D. filed with the Court their *Memorandum in Response to Motion to Enjoin the Plaintiffs from the Continued Occupation of Real Property and Utilization of Coal Mining Permits Issued by the West Virginia Division Of Environmental Protection and Incorporated Memorandum Of Law.* On October 15, 2004, Plaintiffs Regal and Virgil D. filed their *Motion To Enjoin Defendant Dominick LaRosa* (requesting the Court to compel Dominick to reinstate Regal and Virgil D.'s authority to operate under certain DEP permits, to execute certain MR-19s, to honor the contract and to cease interfering with Regal and Virgil D.). Defendant Dominick filed his Response to Plaintiffs' Motion on October 20, 2004. By Order dated October 26, 2004, the District Judge denied Defendants' Motion For Injunctive Relief. By Order dated January 12, 2005 the District Judge granted Plaintiffs' Motion to Enjoin Defendant Dominick LaRosa. On January 25, 2005, Plaintiffs Regal and Virgil D. and Intervenor Courtney F. Foos filed their joint motion for summary judgment. By Order dated March 1, 2005, the District Judge denied the motion for summary judgment. On March 25, 2005, the Parties engaged in a settlement conference and agreed to the Term Sheet of that same date, which included agreeing to this arbitration proceeding.

sale and processing of coal from the EMC Property.[3] The Panel also finds from a preponderance of the evidence that the arrangement, from its inception, entailed the material and substantial participation of Foos Coal to provide coal sales opportunities for coal mined from the EMC Property to fill orders Foos Coal either had or would obtain with customers, including Foos Coal's East Coast utility customers.[4] While the broad parameters of the purported arrangement were agreed upon, Dominick and Virgil D. did not finalize and execute any written agreements setting forth the essential terms and conditions thereof. As the arrangement between the Parties undoubtedly included the sale of goods, the lease of land and duties that could not be performed within a year, and Virgil D. alleges, the payment of a debt of a third-party, the arrangement and its several parts implicate the several statutes of frauds in West Virginia, W. Va. Code § 36-1-3, § 55-1-1 and § 46-2-201.

The Statute of Frauds pertaining to real estate at W. Va. Code § 36-1-3 provides that a contract for a lease of land for more than one year shall not be enforceable unless a note or memorandum is in writing and signed by the party to be charged. Also, the common law Statute of Frauds at W. Va. Code § 55-1-1 provides that any unwritten agreement not to be completely performed within a year is similarly unenforceable. As to the sale of goods, W. Va. Code § 46-2-201 is applicable.[5] Exceptions to the Statute of Frauds are sometimes made where the parties have acted in reliance and where parol evidence clearly establishes the parameters of the

[3] The Panel finds from a preponderance of the evidence that the arrangement between Virgil D. and Dominick followed the time-frame when Global Coal had operated on the EMC property for Dominick and, importantly, followed the shipment of certain test trains for Foos Coal which led Foos Coal to not be willing to enter into a further arrangement with Dominick alone. The Panel finds the testimony of Courtney Foos, Jr. credible and persuasive on this matter (TR 916-919).

[4] Pursuant to the Settlement Agreement and the Arbitration Protocol, evidence about pricing and other details pertaining to the Foos Coal sales agreements with its customers was agreed to be beyond the scope of this proceeding and not subject to discovery or disclosure.

[5] While individual coal purchase orders were entered into between the Parties at various times, no comprehensive written agreement was ever entered into as to the broader parameters of the entire arrangement, including the "coal sales" arrangements between Dominick and his companies and Virgil D. and his companies. The typical "spread" testified to at the hearing was a result of the Foos Coal to Research purchase order price of $30 per ton and a Research to Regal purchase order price of $27 per ton.

agreement. *See e.g.*, Syl. Pt. 3, Blair v. Dickinson, 54 S.E.2d 828 (W. Va. 1949). The West Virginia Supreme Court of Appeals has held that the underlying purpose of the statute of frauds is to prevent the fraudulent enforcement of unmade contracts, rather than the legitimate enforcement of contracts that were, in fact, made. Further, the operation of the statute of frauds goes only to the remedy; it does not render the contract void. Holbrook v. Holbrook, 474 S.E.2d 900 (W. Va. 1996) (citing Timberlake v. Heflin, 379 S.E.2d 149 (W. Va. 1989)). "That distinction between the enforceability and the validity of such contracts . . . is consistent with the principle that, in some circumstances, considerations of equity may result in the statute not being imposed." Id. Essentially, if part performance has put the parties in a position where they cannot be placed in their original positions, then the statute of frauds should not be invoked so as to render an inequitable result.

The Panel finds that no party has satisfied the burden of clear preponderance of the evidence under these statutes of frauds as to the terms of the arrangement between the Parties from 2001 through the effective date of the Settlement Agreement on April 1, 2005.[6] Therefore, the legal analysis could end here with respect to many of the claims asserted by the Parties in this proceeding. However, the actions of the Parties from January 2001 through March 31, 2005 preclude putting these Parties in their original standing. Further, pursuant to the Arbitration Protocol agreed to by the Parties, paragraph 11.2, the Panel "may grant any remedy or relief that the Arbitration Panel deems just and equitable within the scope of the List of Issues for Arbitration and Supplemental List of Issues." Thus, the Panel, based on the evidence and exhibits presented to it and the application of the relevant legal authority in West Virginia, has made determinations about the essential terms and conditions of the arrangement that the Parties

[6] The Settlement Agreement, as previously noted, was signed by the Parties on September 23, 2005, and retroactively made effective as to April 1, 2005.

failed to reduce to writing and about which they continue to disagree. In essence what the Panel has done in this Memorandum Opinion and Final Award, including the Appendix attached hereto as a part hereof, is to start with a clean slate. Then, based on the Panel's findings and rulings concerning the evidence placed before it, the Panel has developed what it believes to be a fair and commercially reasonable arrangement with respect to all of the Parties, the monetary outcome of which it reconciles against the Panel's findings regarding prior payments to arrive at a final net award, as set forth in the Appendix. In addition, the Panel has addressed the other claims and issues that the Parties placed before the Panel in accordance with the Arbitration Protocol.[7]

With the foregoing background and preliminary analysis, the Panel addresses the claims and issues presented to it as follows:

1. Debt Repayment

The business arrangement between Virgil D. and Dominick generally resulted in a spread of $3.00 per ton going to Dominick and his companies. The Plaintiffs claim that spread consisted of $0.75 per ton as a combined royalty and commission for coal owned or leased by Dominick through EMC and mined by Virgil D. and his companies or independent contractors engaged by Cherokee for that purpose. The remaining $2.25 per ton (subject to some variation) according to Plaintiffs was to be applied by Dominick to reduce the indebtedness of Virgil D.'s father and mother, Virgil B. LaRosa and Joan LaRosa, to Dominick and Joseph LaRosa, Dominick's brother. The evidence showed that Virgil B. and Joan LaRosa executed a promissory note in favor of Dominick and Joseph LaRosa in 1982 in the amount of $800,000

[7] Any claims and/or issues that appeared in the Parties' respective claims submissions or were otherwise raised by any party during this proceeding, but not addressed herein, are deemed by the Panel to have been dropped by the Parties during the arbitration, or are otherwise hereby denied by the Panel.

(Joint Exhibit 1), and that Dominick and Joseph LaRosa obtained a confessed judgment against Virgil B. and Joan LaRosa in November 1994 in the amount of $2,844,612.87 (Joint Exhibit 3). The evidence also showed that the amount of the debt was in dispute by Virgil B. and Joan LaRosa and Dominick and Joseph LaRosa. The evidence further revealed that this indebtedness claim is the subject of a bankruptcy proceeding pending in the United States Bankruptcy Court for the Northern District of West Virginia and the issues of that bankruptcy proceeding have been further complicated by the death of Virgil B. LaRosa.

The Statute of Frauds at W. Va. Code 55-1-1(d) is generally applicable to an agreement to pay another's debt as it sets forth that such agreements must be in writing to be enforceable. As previously noted however, no written agreement exists. Further, while the evidence showed that debt reduction was discussed at various times between Virgil D. and Dominick, the evidence was clear that no meeting of the minds ever occurred. Notably, the evidence clearly showed that Joseph LaRosa was not involved in the Parties' business arrangement other than perhaps a small, temporary and tangential role with one of Dominick's companies. Further, the testimony and exhibits showed that no one ever made a determination as to the exact or even approximate amount of the debt. Absent a written agreement or any persuasive corroborating evidence, the Panel finds that Plaintiffs have not proven by a preponderance of the evidence that the business arrangement included an agreement by which some defined part of the funds received by Dominick's companies would be applied to reduce the debt of Virgil D.'s parents to Dominick and his brother Joseph.

AWARD

a. The Panel finds that Virgil D.'s parents, Virgil B. and Joan LaRosa, owed a certain debt to Dominick and Joseph LaRosa, but makes no determination about the present amount of that debt or any obligation concerning repayment.

b. The Panel finds that no written agreement exists between Dominick and Virgil D., or their respective companies, regarding payment on Virgil D.'s parents' debt to Dominick and Joseph LaRosa pursuant to the arrangements that were part of this proceeding.

c. The Panel finds that Joseph LaRosa was not a party to the business arrangement between Dominick and Virgil D. that is the subject of this arbitration.

d. The Panel concludes that the Statute of Frauds is applicable and further concludes that Plaintiffs have not met their burden in showing an agreement between the Parties regarding the repayment of Virgil D.'s parents' debt to Dominick and Joseph LaRosa. Therefore, the Panel makes no award that requires any portion of the monies retained by Research, or paid to Research or any other Dominick company, to be applied as an offset or credit to such debt.

e. No part of this ruling by the Panel is intended to affect any party's claims or issues in the bankruptcy proceeding or any other proceeding addressing such indebtedness and its repayment. There is simply no aspect of this decision and award that would change or modify the amount of the indebtedness, if any, as may be proven in the bankruptcy proceeding or any other proceeding addressing that issue.

2. Century Reserves

Plaintiffs claim that Defendants breached an agreement to make the unpermitted portions of the Century Reserves under the Gebruder Lease available to Plaintiffs. The Century Reserves are that portion of the EMC Property leased by EMC from Gebruder that were released back to

Gebruder by EMC as part of the "Surrender Agreement" dated August 17, 2002 (Joint Exhibit 139D). Both Parties presented experts and financial data regarding the coal that may have been mined and sold from the Century Reserves. Plaintiffs' primary expert, Deborah Reif, attempted to estimate the lost profits and economic damages, but the Panel finds that her testimony included unsupported assumptions and problematic formulas. Defendants' expert, Roger Osborne, by contrast, offered a reasoned assessment and was credible and persuasive in assessing the errors in Plaintiffs' methods and calculations.

The Statute of Frauds at W. Va. Code § 36-1-3 pertaining to the lease or sale of land is applicable. Also relevant to the analysis, the West Virginia Supreme Court of Appeals has held that lost profits resulting from a breach of contract must be proved with "reasonable certainty." Syl. Pt. 1, Cell, Inc. v. Ranson Investors, 427 S.E.2d 447 (W. Va. 1992).[8] The Plaintiffs did not persuade the Panel that an agreement to mine the unpermitted Century Reserves was part of the general arrangement among Virgil D., Dominick and Foos Coal.[9] As with the indebtedness issue of Virgil D.'s parents, the Panel believes there were discussions about such reserves being part of the overall arrangement or being added to the overall arrangement later, but no meeting of the minds. The Panel also finds that the expenses, if any, that Virgil D.'s respective companies incurred related to the Century Reserves were very slight. The Panel further finds that the

[8] The Court adopted the language of the Restatement (Second) of Contracts, and explained: If the breach prevents the injured party from carrying on a well-established business, the resulting loss of profits can often be proved with sufficient certainty. Evidence of past performance will form the basis for a reasonable prediction as to the future. *However, if the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of exert testimony; economic and financial data, market surveys and analyses, business records or similar enterprises, and the like.* Cell, Inc. v. Ranson Investors, 427 S.E.2d at 449-450 (emphasis in original).

[9] Among other evidence that belied that claim in the Panel's view were the affidavits offered by Virgil D., his father, and several of the contract miners, each dated on or about June 20, 2001, which offered support for a royalty rate and minimum royalty more in keeping with what Dominick was trying to negotiate concerning the continuation of the EMC - Gebruder lease than the amounts Gebruder was seeking (Defendants' Exhibit 207 at tab 11). Those affidavits, as well as the circumstantial evidence surrounding the "negotiation" and exchange of written drafts of proposed agreements persuaded the Panel that there was not an initial meeting of the minds between Virgil D. and Dominick about the inclusion of the Century Reserves in their arrangement.

Plaintiffs' performance of their obligations, as a lessee or sublessee under the Panel's findings regarding a commercially reasonable arrangement, was required separate and apart from any activities or work undertaken pertaining to the Century Reserves.[10] Further, even if such an agreement was in place, the Panel finds that the Plaintiffs failed to prove their damages with reasonable certainty as the assumed losses were speculative and not supported with credible data.

AWARD

a. The Panel finds that no written agreement exists and there was insufficient credible corroborating evidence to prove an agreement for Plaintiffs to sublease and mine the Century Reserves.

b. The Panel finds that even if an agreement did exist, the Plaintiffs' evidence regarding lost profits was speculative and not based upon reliable methods and principles.

c. The Panel concludes that Plaintiffs are not entitled to any award for lost profits or other damages for the Century Reserves because of the above-noted Statute of Frauds and the lack of persuasive proof as to the reasonable certainty of damages.

3. Reclamation / Maintenance of DEP Permits and DEP Civil Penalties

Defendants originally claimed that Virgil D. and his companies failed to maintain and reclaim twelve (12) DEP mining permits prior to April 1, 2005, and were liable for resulting damages in the form of civil penalties assessed against EMC by the DEP and estimated costs to reclaim the permit areas.[11] While the Defendants' current claim with respect to reclamation costs is limited to DEP Mining Permit Nos. U-885 (108-I Mine), U-24-84 (106A Mine) and UO-520

[10] Therefore, any detrimental reliance theory was not, in the Panel's opinion, proven by Plaintiffs by a preponderance of the evidence and those slight expenses and efforts did not persuade the Panel as corroborating evidence that the Century Reserves were intended to be part of the arrangement.

[11] These permits included DEP Permit Nos. U-885, U-24-84, UO-520, U-74-83, and UO-401 (each, except for Permit No. U-74-83 [102 Tipple], generally considered to be the permits used by Cherokee's contractors in the course of active mining, and referred to in this discussion as the "active permits") and seven other inactive permits held by EMC that apply to former mining areas located in the general vicinity of the operations conducted by Cherokee's contractors.

(105A Mine), originally the Defendants sought reclamation costs associated with DEP Permit No. UO-401 (Isaac's Run Mine). Not surprisingly, the testimony and other evidence on these issues is in conflict. As more fully explained below, the Panel, as part of the development of a commercially reasonable award under all of the facts and circumstances, has made a determination to award a reclamation escrow fee to the Defendants for the active permits.

a. Reclamation / Maintenance of DEP Permits

The Panel notes at the outset that all of the mining permits at issue were held in the name of EMC throughout the relevant time period.[12] Under applicable statutes and regulations administered by the West Virginia Department of Environmental Protection ("DEP"), EMC (as the permittee) retains primary responsibility for compliance with the terms and conditions of each of those permits, including completion of the reclamation plan. At least with respect to disturbances under the active permits created by mining contractors at the direction of Virgil D., there is some support in the law for the proposition that the DEP could seek to recover reclamation costs in excess of the proceeds of a bond forfeiture from Virgil D., as the "operator" of those mines. However, it is likely that if such authority exists it would be limited to seeking payment for reclamation of only those areas actually disturbed during Virgil D.'s involvement.[13]

Regardless of how or whether the DEP might approach the matter, the question presented is whether or not there is sufficient evidence in the record to support a finding that the Parties intended that all post-mining reclamation under the active permits identified above was to be the obligation of Virgil D. In connection with this claim, Dominick seeks an award against Virgil D.

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[12] Permit No. UO-401 (covering the Isaac's Run Mine) was transferred to Sandridge Coal, LLC on March 2, 2006.

[13] W.Va. CSR § 38-2-12.4.e. In this regard, the Panel notes that at the time Virgil D. assumed responsibility for placing mining contractors on the EMC Permits, there had already been substantial disturbance under DEP Mining Permit Nos. UO-401 (Isaac's Run), U-885 (108-I) and UO-520 (105A). To the extent the amount of disturbance prior to Virgil D.'s involvement could be determined, the DEP would not be expected to seek payment of costs for reclaiming those disturbances from Virgil D.

in the amount of $2,176,600. *See* Defendants' Exhibit 224 (Schedules 1 and 7). For the reasons described below, the Panel finds there is not sufficient evidence to support such an award.

For his part, Dominick testified that in addition to having to post approximately $1 million in bonds and paying $125,000 in cash, the assumption of the reclamation liabilities on the various permits was a major part of the consideration when he purchased the Rauer properties from the bankruptcy estate (TR 4149: 4-10). At that time, Dominick understood that the estimated reclamation costs were "roughly 3 million dollars" for all of the permitted areas (TR 4147: 11-13; Defendants' Exhibit 135). When Dominick assumed the permits in 1995, the DEP was *not* particularly concerned about what operator(s) he was going to employ for purposes of mining under the permits because "it was the responsibility of Energy Marketing to keep up the, maintain the permits." Thus, the DEP never expressed any concern that EMC contract with an operator who had mining experience, and did not require that such a proposed operator meet any other particular requirements before being approved. ("No, Energy Marketing assumed that responsibility.") (TR 4545: 20-24; 4546: 1-11). Because Dominick understood so well that the DEP would be looking to him for the completion of reclamation under the permits, it would be reasonable to expect that if their agreement included the assumption of this obligation by Virgil D., that is something that would be a subject of considerable discussion (both orally and in writing). With the exception of draft agreements prepared by the Parties' lawyers, however, that appears not to have been the case.

For his part, Virgil D. testified that during his initial discussions with Dominick in reaching an agreement in December 2000, "one of the major issues" was that none of Virgil D.'s companies would be responsible for final reclamation at any of the permit areas (TR 460: 4-9). To the extent that Virgil D. or his contractors undertook any reclamation, he testified that he

viewed that as a part of his obligation to "maintain" the permits in good standing with the DEP rather than work towards complete and final reclamation.[14] The only reclamation work that Virgil D. completed consisted of eliminating a highwall on the "10 Left" permit site and a highwall on the permit area for the "Post Mine," pursuant to DEP orders (TR 131:5-22). Significantly, neither of those permits was the site of mining by Virgil D. or his contractors, supporting his testimony that such reclamation was not done as a part of an effort to discharge an obligation to conduct complete post-mining reclamation under those permits.[15]

Virgil D. also testified that one of the reasons he rejected proposed draft agreements prepared by Dominick's law firm (Kirkpatrick & Lockhart, herein "K&L") was the inclusion of provisions requiring that he assume responsibility for post-mining reclamation (TR 192:12-17). Soon after he received the initial set of draft agreements from K&L in December, 2001, Virgil D. testified that he raised this with Dominick, reminding him that final reclamation of the permit areas had not been a part of their oral agreement (TR 461:10-18). Had he agreed to assume that obligation, Virgil D. testified that he would have had to reduce the amounts paid to his contractors in order to reserve funds for reclamation, and Virgil D. was concerned that this reduced payment rate would have jeopardized his contractors' financial stability (TR 476: 16-20; 477: 1-10).

b. DEP Civil Penalties

During the time that an "operator reassignment" is in effect, the DEP has the discretion to pursue enforcement against the permittee, the operator, or both, depending upon whom the DEP

[14] For example and consistent with Virgil D.'s testimony about this issue, DEP Permit No. U-24-84 for the 106A Mine, which was a start-up at a previously undisturbed location, was obtained by EMC and reassigned (but not transferred) to Fairmont Energy, Inc.

[15] It was Virgil D.'s testimony that after one of the mines on the EMC property had been "mined-out," his only obligation was to find another area and start mining again. "Final reclamation" was not a part of his obligation. (TR 459: 17-23).

believes is primarily at fault or should be pursued with respect to a particular violation. W.Va. CSR § 38-2-3.25. Here, the only permit that was actually reassigned to a Virgil D. company was Permit No. U-74-83, a permit under which no coal extraction took place. The other active permits were reassigned to various Cherokee contractors, but not to Virgil D. or any of his associated companies. *See* Plaintiffs' Exhibits 139-a (Permit No. UO-520 assigned to Twoinone Coal Company, Inc. on August 6, 2002); 135 (Permit No. U-24-84 assigned to Fairmont Energy, Inc. on July 11, 2002); 136-a (Permit No. U-885 assigned to Roblee Coal Co. on August 29, 2001) and 138-a (Permit No. UO-401 assigned to Signal Resources, LLC on April 26, 2001). Accordingly, the DEP would not have been authorized to bring direct enforcement actions or assess civil penalties against any of Virgil D.'s companies for violations at the active mining sites.

Regardless of the extent of the DEP's authority to pursue one of Virgil D.'s companies directly, Dominick asserts that under the Parties' arrangement Virgil D. or one of his companies agreed to assume responsibility for all violations and associated civil penalties assessed by the DEP against these EMC permits through March 31, 2005. In connection with this claim, Dominick seeks an award against Virgil D. or one of his companies in the amount of $638,294.00. *See* Defendants' Exhibits 208, 224 (Schedule 1). For the reasons described below, the Panel finds there is not sufficient evidence to support such an award.

As indicated in the discussion of the reclamation issue immediately above, Virgil D. readily concedes that under the Parties' agreement he was responsible for keeping the permits in compliance with applicable legal standards. *See* TR 144:5-13 (Virgil D.'s understanding was that beyond mining the coal, his only other obligations were "the financial obligations of maintaining all the expenses on the permits"). However, Virgil D. contends that due to the confusion created

by Dominick regarding the proper party to be notified by the DEP as to compliance issues, Dominick's failure to take actions that only he could take in order to abate pending violations, and Dominick's failure to seek review of proposed penalties via the DEP's informal conference process, neither Virgil D. nor any of his companies should be held responsible for whatever amounts the DEP is seeking from Dominick. In addition to these significant questions raised by Virgil D., the Panel notes that the factual basis for the claimed entitlement to an award of $638,294.00 is quite weak, inasmuch as: (a) no effort was made, on a comprehensive basis, to tie specific violations to actions or inactions of Cherokee or its contractors; (b) no evidence was introduced connecting individual notices of violation or cessation orders caused by Virgil D., any of his companies or Cherokee's contractors to specific civil penalty amounts; and (c) there was no attempt to address the question of whether any of the civil penalties for which Dominick is seeking reimbursement have been finally assessed or are yet subject to informal review and possible reduction (and if not, whether the informal review process was timely initiated before the penalty amounts became final).

AWARD

a. The Panel finds that the Defendants have not proven the existence of an agreement between the Parties addressing the obligation of Virgil D. or any of his companies to complete (or pay for) post-mining reclamation under the permits. However, the Panel finds that it would have been commercially reasonable for the Parties to have provided for some type of reclamation escrow as a part of a comprehensive agreement for the development of the EMC reserves, utilizing the EMC permits.

b. Assuming that Virgil D., or any of his companies, is responsible for payment of some part of the costs of reclaiming the active mining permits held by EMC, the Panel finds that the

Defendants have not proven with substantial certainty the amount of any such reclamation costs that are attributable to disturbances under those permits by Virgil D. or his contractors.

c. Recognizing that it is not unusual to find such a provision in coal leases and subleases, and the equitable considerations involved in establishing the terms of the Parties' agreement (including in particular the relative amount of disturbance, or lack of disturbance, that pre-dated the Parties' agreement), the Panel finds that the Defendants are entitled to some payment for reclamation costs they have incurred due to mining by Cherokee's contractors. The Panel concludes that a reclamation escrow concept is a commercially reasonable application in this scenario.

d. Under all of the circumstances the Panel further finds that the Defendants are entitled to an award of reclamation costs in the amount of $0.50 / ton on all tonnage mined by Cherokee's contractor under DEP Permit No. U-24-84 (106A Mine), the previously undisturbed area, for a total award on this basis of $98,905. (*See* the Appendix for calculation details.)

e. Under all of the circumstances, the Panel therefore finds that the Defendants are entitled to an award of reclamation costs in the amount of $0.25 / ton on all tonnage mined by Cherokee's contractors under DEP Permit Nos. U-885 (108-I Mine), UO-401 (Isaac's Run Mine) and UO-520 (105A Mine), the previously disturbed areas, for a total award on this basis of $287,458. (*See* the Appendix for calculation details.)

f. The Panel finds that the Defendants have not proven the existence of a definitive agreement between the Parties requiring that Virgil D. or any of his companies reimburse Dominick for civil penalties incurred under the EMC permits, and any such agreement would not have been commercially reasonable unless it required specific proof that Virgil D. (directly or through his contractors) created the violation that led to the penalty assessments.

g. Even assuming that the Panel was to find that Virgil D. or any of his companies may be responsible for some portion of the DEP civil penalties assessed against a Dominick company, the Panel concludes that the Defendants have not proven the specific amount of any such damages to a reasonable degree of certainty. The Panel therefore declines to grant an award of damages to the Defendants on this claim.

h. As briefly discussed concerning the Century Reserves issue above and more fully and specifically discussed in this section addressing reclamation and permit maintenance obligations, the Panel finds that the Plaintiffs have not proven any type of quantum meruit claim against Defendants but rather any such efforts were part of the consideration expected of a lessee or sublessee in a commercially reasonable arrangement in accordance with all other aspects of this decision and award. Therefore, the Panel makes no award to the Plaintiffs for their quantum meruit claim.

4. Equipment

Defendants claim that the Plaintiffs or Cherokee's contract miners used equipment owned by Dominick and his companies in mining the EMC coal and that one of Virgil D.'s companies agreed to purchase the equipment for $1.8 million. In the alternative, if no agreement is found, then Defendants claim Plaintiffs owe rent for the use of the equipment. The evidence showed that there were two bills of sale drafted (Joint Exhibit 15); however, neither was signed by both Dominick and Virgil D. Additionally, another document, the Equipment Rental Agreement (Joint Exhibit 140C), contained provisions that certain equipment would be rented by Cherokee from EMC at $0.40 per ton. John Feddock for the Plaintiffs testified that the value and usefulness of the equipment was worth very little other than for scrap due to the equipment's age and unreliability (TR 5940-5945). Robert Jeran also testified for the Plaintiffs as to the poor

condition of the equipment and that none of it was used in his operations. (TR 2192-2200). The evidence did show that there was some slight use of certain pieces of the equipment and perhaps some "use" of the equipment as a source of scrap parts. The evidence also showed and the Panel finds that the equipment was of a heavily used nature when acquired by one of Dominick's companies at auction and therefore the equipment had only a low value. (*See* TR 1582-1584, testimony of Christopher Wolfe, and TR 6294-6298, testimony of Steven Hite.)

The Panel finds that the Defendants have not proven a sales agreement for $1.8 million for the equipment. However, the Panel finds that there was some slight use of certain pieces of the equipment and "use" as a source of scrap parts, at the 105A, 106A and Isaac's Run mines (but not the 108-I Mine where Rob Jeran testified credibly that he used his own equipment and not any of the equipment at issue). Under these facts and circumstances, the Panel, in its discretion, finds that a commercially reasonable term for the use of the equipment is $0.05 per ton for all "contractor" tons mined and shipped from the EMC property, excluding the 108-I Mine tons, from January 2001 through March 31, 2005.

AWARD

a. The Panel finds that Virgil D. and Dominick did not enter into an agreement for the sale of Dominick's equipment for $1.8 million.

b. The Panel finds that certain pieces of the equipment was used or utilized for scrap parts by Plaintiffs, or Cherokee's contract miners, on the EMC Property (excluding the 108-I Mine) during the January 2001, through March 31, 2005 time-frame.

c. The Panel finds that $0.05 per ton is a commercially reasonable term for the use or utilization of the equipment, given its heavily used condition and low value, to apply to all of the

tons from the EMC Property (excluding the 108-I Mine) from January 2001 through March 31, 2005.

d. The Panel awards Defendants $17,044, which represents $0.05 per ton for all tons mined and shipped from the EMC Property (excluding the 108-I Mine) from January 2001 through March 31, 2005. (*See* the Appendix for calculation details.)

5. Royalty

a. Regular

As with the other parts of the arrangement, no written agreement exists pertaining to the royalties due EMC for coal mined and sold from its property. Defendants claim that they are entitled to royalties in an amount to be determined as commercially reasonable for all coal mined through March 31, 2005 by or for Virgil D. and his companies on property owned by EMC, and presented testimony that a commercially reasonable rate would have been between 6% and 8%. John Weiss, a mining engineer, testified for the Defendants that specifically in regard to the 108-I mine that a 7% to 8% royalty would have been commercially reasonable given the existing permits and infrastructure. Plaintiffs countered with testimony from John Feddock, also a mining engineer, that a commercially reasonable rate would have been approximately 2% and Plaintiffs further contend that this was the deal reached between the Parties with respect to the $3 spread. Plaintiffs state that the lower rate is appropriate because of the circumstances surrounding the beginning of operations at 108-I, namely that Dominick had to begin mining or else he risked losing his DEP permits for the property. Plaintiffs further based their calculations on the premise that Virgil D. and his companies had to expend vast sums of money to maintain the non-producing permits and that these costs were a benefit to Dominick and his companies.

Defendants countered, however, that the lessor is typically not responsible for development costs, marketing, equipment or infrastructure.

Given the evidence and testimony presented to it, the Panel finds that a commercially reasonable royalty rate for coal from the 108-I mine is 7%.

b. Override

Dominick also claims that he and his companies are entitled to override royalties in an amount to be determined as commercially reasonable for all coal mined through March 31, 2005 by or for Virgil D. and his companies on property leased to EMC by Gebruder, and subsequent to the Surrender Agreement, Penn Virginia. These properties include the Isaac's Run, 105A and 106A mines. Mr. Weiss testified that override royalties in the Eastern United States would typically range from 1% to 5% and that the combined royalty/override royalty would rarely exceed 10%. Plaintiffs contend that the deal reached was much smaller than that, amounting to a combined royalty/override royalty of 3%. Mr. Feddock testified for the Plaintiffs that the amount of money put in by Virgil D. and his companies served to make such a rate commercially reasonable given the circumstances. However, the Panel finds that Virgil D. and his companies encountered no more costs or expenses and expended no more monies than is typical of a normal lessee or sublessee operating a mine and incurring the regular costs of business. Therefore, the Panel rejects Plaintiffs' quantum meruit claim and further finds, in its discretion, that a commercially reasonable override royalty rate of 3% is appropriate.

c. Landlord Royalty Reimbursement

Dominick claimed that EMC was owed $550,719 from Cherokee for unreimbursed royalties paid by EMC to Penn Virginia (consisting of $280,862 of actual payments and $269,857 in recoupment amounts, *see* Defendant's Exhibit 224, Schedule 8). Although, as is the

case with other significant aspects of their arrangement, there is no definitive written agreement between a Dominick company and a Virgil D. company, the Panel finds that reimbursement of landlord royalties by a sublessee would be a commercially reasonable term under all of the facts and circumstances surrounding this arrangement. The Panel finds by a preponderance of the evidence that EMC was due, but was not reimbursed, payments it made to its landlord, Penn Virginia, in the amount of $280,862.00. (*See* Defendant's Exhibit 224, Schedule 8.) The Panel was not, however, persuaded by the testimony or evidence presented to it that EMC was entitled to reimbursement for the "recoupment" amount set forth at Defendant's Exhibit 224, Schedule 8.

AWARD

a. The Panel finds that neither Plaintiffs nor Defendants have proven what percentage of royalty or override royalty were contemplated by the Parties.

b. The Panel finds that the royalties must be calculated according to a commercially reasonable standard.

c. The Panel finds that 7% is a commercially reasonable royalty rate for the applicable tons mined and sold from the EMC property at 108-I mine.

d. The Panel finds that 3% is a commercially reasonable override royalty rate for the applicable tons mined and sold from the EMC property leased from Gebruder and later Penn Virginia at the Isaac's Run, 105A and 106A mines.

e. The Panel concludes that Plaintiffs are not entitled to quantum meruit for the costs incurred in operating the mines as lessee and sublessee.

f. The Panel concludes that Plaintiffs owe Defendants and hereby awards Defendants $2,172,088 for royalties for tons mined and sold from the 108-I mine during the applicable time-frame. (*See* the Appendix for calculation details.)

g. The Panel concludes that Plaintiffs owe Defendants and hereby awards Defendants $314,745 for override royalties from the Isaac's Run, 105A and 106A mines.[16] (*See* the Appendix for calculation details.)

h. The Panel finds that EMC is due $280,862 for non-reimbursed landlord royalty payments. However, the Panel also finds that EMC did not prove that it is entitled to any additional monies for recoupment of said landlord royalties.

6. Commission

Defendants claim that they are entitled to a sales commission in an amount of $3.00 per ton not only for the coal mined by or for Virgil D. and his companies from the EMC Property, but for all other tons that were prepared or shipped through the Rawhide Plant on Foos Coal orders, or otherwise, during the period from January 2001, through March 31, 2005, and whether or not Research had any involvement.[17] Defendants' expert witness, Roger Osborne, testified that $3.00 per ton as a commission was commercially reasonable. Plaintiffs set forth that Dominick was not actually involved in the sales process and in fact, was an impediment to selling the coal. The Panel finds that the evidence showed that Dominick's involvement in the sales process was not at all substantial, but the payment arrangements, including the back-to-

[16] *See* Defendants' Exhibit 224, Schedule 4 and Schedule 10, as well as Schedules 3 and 3A. Dominick claimed that a certain portion of the Isaac's Run tons were "trespass" coal because they were sold to Capitol Cement by Regal rather than being placed on Foos Coal orders. While not endorsing the unorthodox accounting procedures of Virgil D.'s companies, the Panel did not find Dominick's evidence persuasive to prove a claim for trespass coal as explained more fully below. Further, based on the Panel's comprehensive award of royalties, override royalties and commissions to EMC, the Panel finds that the Isaac's Run tons should be accounted for as override tons and has based the amount EMC is entitled to recover as an override on the higher Foos Coal sales prices for such tons rather than the Capitol Cement realization Regal received. In addition, the Panel does not give any credit or offset to Regal for the amounts spent by it or Foos Coal to acquire tonnage from sources other than the EMC Property to fill the Foos Coal orders since the Panel finds that a preponderance of the evidence supports Dominick's companies being entitled to a sales commission (although not at the rate requested by Dominick's companies) for all tons (regardless of source) that were shipped on Foos Coal orders from the Rawhide Plant during the timeframe of January 2001 through and including March 31, 2005.

[17] These tons include coal sold by Plaintiffs to Blackhawk Mining and Capitol Cement not through Foos Coal or Research and for which Defendants claim trespass damages as discussed below.

back purchase orders, gave Research an involvement that was something more than a typical lessor of coal reserves.

The Panel finds that during the relevant time-period, there were 2,313,195 tons of coal shipped from the Rawhide Plant on Foos Coal orders (Plaintiff's Exhibit 205 and Defendant's Exhibit 224, Schedule 10E) and only 1,347,642 tons produced from the EMC Property and shipped from the Rawhide Plant (Plaintiff's Exhibits 199, 200, 201 and 202, each for tons through March 31, 2005, and Defendant's Exhibit 224, Schedules 10A, 10B, 10C and 10D). The Panel finds that Dominick and his companies did not participate in any of the logistical or financial arrangements for obtaining the additional tonnage required on the Foos Coal orders beyond the tons available from the EMC Property. Although Dominick argued that the "spread" was merely his profit in the arrangement due to the independent purchase orders between Research/Foos Coal on the one hand and Regal/Research on the other hand, the Panel did not find his testimony credible on that point.[18] Under Dominick's scenario, from the inception of mining on the EMC property by Cherokee's contract miners, no payments were made by Virgil D. or any of his companies to EMC or any of Dominick's companies for royalties, commissions, use of equipment or any other sums now demanded by Dominick. Based on the Panel's observations of Dominick while he testified at the hearing, it does not believe he would have patiently waited for such payments if he believed he was entitled to them.

Likewise, the Panel did not find Virgil D.'s testimony credible that the agreement he had with Dominick was that $0.75 per ton would serve as a combined royalty and commission. The Panel also finds such an amount would not be commercially reasonable under all of the facts and

[18] Dominick's reliance on the purchase orders is not persuasive because the testimony and evidence showed that Virgil D., Foos Coal and Dominick did not simultaneously enter into separate arrangements, but instead met together and forged a single arrangement between themselves. To that end, the Panel found persuasive testimony from Courtney Foos that he would not have entered into business again with Dominick after his initial deal and test trains largely failed in 2000, but for Virgil D.'s efforts (TR 916-919).

circumstances. Moreover, the earliest corroborating evidence (beyond Virgil D.'s testimony about that aspect of the arrangement) that Plaintiffs could point to was a May 28, 2003 letter from Robert Greer to Gregory Schillace, some twenty-nine months after the inception of the arrangement (Plaintiffs' Exhibit 167).

Foos Coal presented evidence about its experience, expertise and relationships with East Coast utility customers, and arranging for coal sales to those established customers. The Panel finds that Foos Coal was the primary sales agent in the arrangement among Dominick, Virgil D. and their respective companies and Foos Coal and that it was Foos Coal's sales efforts which made the arrangement financially viable for all of the participants.[19]

The Plaintiffs did not dispute that Research was entitled to a commission on tons acquired from non-EMC Property sources and sold by Regal to Foos Coal customers. The Panel finds by a preponderance of the evidence that Research was entitled to a commercially reasonable commission on all Foos Coal tons shipped from the Rawhide Plant from January 2001, through March 31, 2005, even if the source of such tons was from non-EMC Property.

Taking into account the evidence, which included a payment structure the Panel finds was requested by Dominick, authorized by Virgil D. and agreed to by Foos Coal, consisting of initial "purchase orders" between Foos Coal and Research and back-to-back "purchase orders" between Research and Regal, the Panel in its discretion finds that $0.10 per ton for the coal sold through the Rawhide Plant (on all Foos Coal orders, regardless of whether such tons originated from EMC Property) in the applicable time period, January 2001, through March 31, 2005, is

[19] While the Defendants would challenge the credibility of Courtney Foos, Jr. on the basis of certain "bird dog", "spy" or "incentive" payments made by Foos Coal to certain witnesses in this proceeding, the Panel did not find that any such payments affected the reliability of any evidence the Panel has relied upon in making this decision and award. The Panel would note that it did take into account the amounts of incentive payments made by Foos Coal to Regal in calculating sales prices from which to determine royalty and override royalty payments due to EMC as more fully explained in the Appendix at Section II.A.5.

a reasonable sales commission for the limited role Dominick and his companies played in selling the coal.

AWARD

a. The Panel finds that the Defendants have not proven that Dominick and his companies were entitled to a commission or spread of $3 per ton.

b. The Panel finds that Dominick and his companies engaged in a role somewhat different than the normal lessor by having some slight, purely administrative, involvement in coal sales arrangements put together by Foos Coal; however, Dominick and his companies did not materially participate in acquiring customers or orders for the subject coal and did not participate in the responsibility for filling the Foos Coal orders when tonnage from the EMC Property was inadequate to do so.

c. The Panel finds that Research is entitled to a commercially reasonable commission for that limited role under all of the facts and circumstances of the arrangement.

d. The Panel finds that $0.10 per ton is a commercially reasonable term for the sales commission due from Plaintiffs to Research.

e. The Panel concludes that Research is due and is hereby awarded $231,320 as a sales commission. (*See* the Appendix for calculation details.)

B. OTHER ISSUES PERTAINING TO THE 2001-2005 ARRANGEMENT

1. Trespass Coal

Defendants claim that Virgil D. and his companies owe damages for certain coal allegedly mined and sold to entities other than Foos Coal or Foos Coal customers from the EMC Property. Defendants allege that Cherokee mined and sold 120,627 tons of coal to Capitol

Cement and 1,088 tons to Blackhawk Mining without paying royalty or other compensation to EMC. Defendants further allege that Plaintiffs not only owe compensation for the coal, but also damages for trespass.[20]

Plaintiffs generally admit that Cherokee did not explicitly pay EMC royalties or override royalties for the coal mined from the EMC Property and sold to Capitol Cement and Blackhawk Mining, but state that any monies owed were accounted for and offset against monies paid to EMC for non-EMC coal acquired at no expense to Defendants and sold through Foos Coal. Plaintiffs also object to Defendants' characterization of Plaintiffs' actions as trespassing.

The Panel finds that Dominick had an active presence and awareness concerning the EMC Property and the entities which were mining coal on such properties during the relevant time periods. The Panel further finds that while Virgil D.'s companies' accounting procedures were very unorthodox, the quantity of tons mined and sold from the EMC Property and the amount of monies that Dominick's companies retained or received for those tons did effectively compensate Dominick's companies for any amounts (royalty, override royalty and commission) due for such tons (although in the Panel's opinion certainly not in any traditional manner which typical accounting records could verify).[21] Moreover, the funds Dominick's companies retained or were paid were not negatively impacted by the different ultimate customer (i.e., Foos Coal

[20] Trespass is commonly explained as the unlawful entry upon another's land. The measure of damages for trespass in mining cases where the trespass was not willful is the value of the coal after it is taken from the premises and sold or stored, less the proper expense of such severance. Syl. Pt. 3, Condry v. Pope, 166 S.E.2d 167 (W. Va. 1969); *see also* Spruce River Coal Co. v. Valco Coal Co., 120 S.E. 302 (W. Va. 1923). If the trespass was willful and deliberate, then the trespasser does not get any credit for expense and is liable for the value of the coal. Condry, 166 S.E.2d at 171.

[21] While a traditional accounting and "tracking" of tons mined and sold from the EMC Property (through to the customer) was not completed by Cherokee or Regal or any other of Virgil D.'s companies, the records the Panel was provided, coupled with the fact that the sales chain ended with Foos Coal for any shipments on Foos Coal orders (by the agreement of the Parties), persuaded the Panel that the quantity of tons mined and sold from the EMC Property was accounted for in a manner that resulted in EMC being paid what would amount to a reasonable royalty or override royalty (especially since the Foos Coal orders were at prices higher than the customers that the subject EMC origin tons were shipped to) and inconsistent with trespass or an intent to "hide" and not pay or account for such tons - all as accounted for by the Panel in the commercially reasonable arrangment imposed herein and the reconciliation of that arrangement to the payments, as summarized in the Appendix.

orders versus other Rawhide Plant customers), especially where the average sales price for the Foos Coal orders was greater than the sales price for the other customers. Also, at the time in question, the Panel finds that no royalty reports were made and none were asked for in the arrangement. Therefore, the Panel does not find any attempt on the part of Virgil D.'s companies or the contractors retained by Cherokee to hide or misrepresent tonnage figures for either coal mined from the EMC Property (independently verifiable from monthly production reports filed with the State of West Virginia, Office of Miners' Health, Safety and Training, Defendant's Exhibit 118) or tons ultimately shipped on Foos Coal orders from the Rawhide Plant (independently verifiable from railroad weight sheets, Plaintiff's Exhibit 205 and Defendant's Exhibit 224, Schedule 10E). The Panel finds that the Defendants failed to prove by a preponderance of the evidence that any of Virgil D.'s companies or contract miners committed a trespass for any presence on the EMC Property or for the mining of any tons, whether such tons were sold to Capitol Cement or Blackhawk rather than to Foos Coal customers.

The Panel notes that any tons the Defendants sought to claim as trespass tons have been fully taken into consideration and accounted for by the Panel as either tons subject to royalty or override royalty, and for applying the commission determined to be applicable by the Panel for all such tons.

AWARD

a. The Panel finds that the Cherokee and its contract miners were on the EMC Property with Defendants' knowledge and permission.

b. The Panel finds that the Defendants failed to prove by a preponderance of the evidence that Virgil D., Cherokee, or Cherokee's contractors committed a trespass, and Defendants' claim for Trespass Coal is denied.

2. Tortious Interference

a. Dominick's claims of civil conspiracy and tortious interference against Virgil D. and Foos Coal

Defendants allege civil conspiracy and tortious interference against Plaintiffs and Foos Coal related to Plaintiffs and Foos Coal entering into coal purchase orders and not including Dominick. The West Virginia Supreme Court of Appeals has held regarding tortious interference:

> To establish prima facie proof of tortious interference, a plaintiff must show:
>
> (1) existence of a contractual or business relationship or expectancy;
>
> (2) an intentional act of interference by a party outside that relationship or expectancy;
>
> (3) proof that the interference caused the harm sustained; and
>
> (4) damages.
>
> If a plaintiff makes a prima facie case, a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable for interference that is negligent rather than intentional, or if they show defenses of legitimate competition between plaintiff and themselves, their financial interest in the induced party's business, their responsibility for another's welfare, their intention to influence another's business policies in which they have an interest, their giving of honest, truthful requested advice, or other factors that show the interference was proper.

Syl. Pt. 2, Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1983).

The Plaintiffs and Intervenor state that Defendants' claims must fail principally because there was no outside interference in the business arrangement. Additionally, Foos Coal's position was that Defendants never had a contractual expectancy because there was never a signed exclusivity agreement between any of the Parties.

The Panel finds that by a preponderance of the evidence, any purchase orders entered into between Foos Coal and Virgil D.'s companies occurred because of Dominick's unwillingness to

timely execute documentation reasonably requested by Foos Coal to satisfy its customers. Although Dominick's position was that there were parallel agreements between himself and Foos and himself and Virgil D., the Panel found persuasive Courtney Foos' testimony that he no longer wanted to work with Dominick after November 2000, and was only persuaded to do so because of Virgil D.'s efforts to forge a three-way deal (TR 916-919). Therefore, there was no outside interference in any of Dominick's contractual arrangements. The Panel finds that there was no exclusivity agreement of any type entered into between Dominick and Foos Coal. Additionally, the Panel finds that Dominick's companies suffered no damage as a result of any purchase orders entered into between Foos Coal and Virgil D.'s companies since Dominick's companies received through applicable payments by either Foos Coal or one of Virgil D.'s companies the same amount of monies that Research would have retained had it received the full payments initially from Foos Coal or as otherwise accounted for in this opinion and award.

b. Virgil D.'s claim against Dominick regarding the contract miners

The Plaintiffs claim tortious interference against Dominick based upon allegations that Dominick contacted and interfered with Virgil D. and his companies' relationships with contract miners. While Plaintiffs presented testimony from some of Virgil D.'s contract miners, the evidence showed that Dominick's interference was negligible, did not materially interfere with or disrupt any contract miner's operations, and further, Virgil D. and his companies suffered no damages as a result.

AWARD

a. The Panel finds that Virgil D., Dominick and Foos Coal were each involved in the business arrangement from the outset in 2001.

b. The Panel finds that the Parties never entered into exclusivity agreements with one another.

c. The Panel finds that the Plaintiffs suffered no damages from any contact Dominick may have had with the contract miners.

d. The Defendants have not proven tortious interference or civil conspiracy because the Panel finds there was no outside interference nor was there a contractual expectancy.

e. The Plaintiffs have not proven tortious interference because the Panel finds they have not shown evidence of any damages.

3. Intentional Infliction of Emotional Distress

Virgil D. claims that Dominick committed against him the tort of intentional infliction of emotional distress. A claim of intentional infliction of emotional distress requires: (1) that the tortfeasor's conduct was intentional or reckless; (2) the tortfeasor's conduct was extreme and outrageous, i.e., beyond all possible bounds of decency, atrocious, intolerable in a civilized community; (3) the tortfeasor's conduct caused the victim to suffer severe emotional distress. Hines v. Hills Dept. Stores, Inc., 454 S.E.2d 385, 389 (W. Va. 1994) (quoting Syl. Pt. 6, Harless v. First Nat. Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982)). Physical injury is not necessarily required. Id. The West Virginia Supreme Court of Appeals has stated: "[intentional infliction of emotional distress] is a difficult fact pattern to prove." Hines, 454 S.E.2d at 390.

Virgil D. did not offer any persuasive evidence that he suffered severe emotional distress. Further, the Panel finds that Virgil D. has not proven that Dominick's actions were so extreme and outrageous so as to prove a claim for intentional infliction of emotional distress.

AWARD

a. The Panel finds that Plaintiffs have not offered sufficient evidence to prove that Dominick intentionally inflicted emotional distress upon Virgil D.

b. The Panel does not award Plaintiffs any damages for the claim of intentional infliction of emotional distress.

C. REMAINING ISSUES INVOLVING THE SETTLEMENT AGREEMENTS AND INJUNCTIVE RELIEF

1. Default of the Settlement Lease and Sublease of September 23, 2005

The Parties in this arbitration proceeding entered into the Settlement Agreement on September 23, 2005, retroactively effective April 1, 2005, between themselves as well as the parties to the underlying civil action in the United States District Court for the Northern District of West Virginia, Case Number 2:03-CV-90 (Panel Exhibit 1). As part of that agreement, Credible agreed to lease to Cherokee certain coal at the 108-I Mine ("Settlement Lease"), including the Pittsburgh and Redstone seams, and Credible agreed to sublease to Cherokee the Redstone seam of coal at the 106A mine upon obtaining the written consent of Penn Virginia ("Settlement Sublease"). The Settlement Agreement also contemplated the Pole Building and Road Use Agreement that provided a non-exclusive right-of-way. EMC/Credible also granted to Regal the Right of First Refusal with respect to coal mined from the surrendered Century Reserves in the Assignment between EMC/Credible and Regal dated April 1, 2005. The Assignment required Regal to pay a Fugitive Fee of $1.375/ton (Panel Exhibit 1F, ¶ 18).

Defendants allege that the Plaintiffs failed to meet the minimum production requirement and failed to keep adequate records required by the Lease and Sublease, and further, failed to pay

Credible the Fugitive Fee due under the Assignment for certain coal recovered from the Century Property.

a. Minimum Production

Defendants allege that Plaintiffs did not meet the minimum production requirements of the Settlement Lease for the 108-I Mine in November and December 2006. (*See* Exhibits 1 and 2 to Defendants' March 6, 2007, "Motion by Credible, Inc. and Energy Marketing Co., Inc. to Include Claims Arising Under Agreements Executed September 23, 2005.") Section 8(a) of the 108-I Mine Settlement Lease provides for termination of the lease if, absent an event of force majeure, there are two consecutive months of less than minimum production, meaning producing and selling not less than 11,000 tons of coal products from the leased premises per calendar month. The evidence showed that Cherokee produced and sold only 7,983.97 tons in November 2006 and only 4,248.67 tons in December 2006. Further, it is undisputed that Plaintiffs did not claim force majeure. The agreements contain cross-default provisions and Defendants ask that the Settlement Lease, Settlement Sublease, Pole Building right-of-way agreement, the Assignment, and any other agreements under the Settlement Agreement be terminated.

b. Fugitive Coal

The Assignment provides that if Regal sells EMC coal without offering said coal to EMC through its right of first refusal, then said coal is deemed "Fugitive Coal" and Regal is liable to pay the "Fugitive Fee" of $1.375 per ton to Credible (Panel Exhibit 1F, ¶18). Defendants allege that Plaintiffs participated in the sale of 5,474 tons of coal from the Century Property without paying the requisite Fugitive Fee. (*See* Defendants' Exhibit 240 at 3-5.) Defendants further allege that the amount owing from Regal is $7,527. Defendants additionally state that the failure to pay timely is a breach of the Assignment and Regal is not entitled to cure such a

default. The evidence supports the Defendants' claim that a Fugitive Fee was due but was not paid.

c. Inadequate Records

Defendants allege that Plaintiffs failed to maintain adequate records with regard to the Settlement Lease and Settlement Sublease under the Settlement Agreement. Defendants also allege fraud with regard to the weigh sheets and allege that Plaintiffs fabricated the records resulting in hidden tons for which Defendants were not paid. Defendants relied on the testimony of Ms. Pam Harris who worked at the Cheyenne tipple scale house from December 2004 through November 2005. While Ms. Harris testified that certain records were altered, the Panel did not find her testimony persuasive or reliable on the hidden tons issue. Defendants also referred to Brad Doyle's testimony, a truck driver who delivered coal to Cheyenne. The Panel did not find Mr. Doyle's testimony persuasive as to the hidden tons because it was based in speculation and not corroborated.

While the evidence supports the Defendants' allegation that certain Cheyenne weigh sheets were fabricated, the Panel finds that the evidence does not support a showing of lost or hidden tons or amounts due to Defendants that were not paid. Insofar as these inadequate records violate the terms of the Settlement Lease and Settlement Sublease, the Panel does not reach this issue since it has already determined those agreements to be terminated.

AWARD

a. The Panel finds that Plaintiffs defaulted under the 108-I Mine Settlement Lease because they did not meet the minimum production requirements for the 108-I Mine in November and December 2006, and the same was not excused by an event of force majeure. The Panel further

finds that Plaintiffs did not assert a claim of force majeure in an attempt to have the performance failure excused.

b. The Panel finds that certain Cheyenne weigh sheets were fabricated for no apparent purpose. However, the evidence does not clearly and convincingly establish that the fabricated records were used in any manner that caused any damages to the Defendants.

c. The Panel finds that 5,474 tons of coal were mined and sold from the Century Property without "Fugitive Fee" payment to Defendants, as required by the Assignment effective April 1, 2005 (Panel Exhibit 1F).

d. The 108-I Mine Settlement Lease, the 106A Mine Settlement Sublease, the Pole Building right-of-way agreement, the Assignment, and any other agreements pertaining thereto under the Settlement Agreement shall be terminated; however, utilizing the discretion granted to the Panel in the Arbitration Protocol, such termination shall only be effective upon the Plaintiffs' receipt of the net payment due Plaintiffs from Defendants, as set forth in the Appendix.

e. The Defendants did not meet the clear and convincing burden for proving fraud with regard to Plaintiffs' record keeping at the 106A Mine and therefore the Panel makes no award for Defendants' claim of hidden tons.

f. The Defendants did not show lost revenue from the alleged inadequate record keeping at the 106A Mine with clear specificity.

g. Defendants are due $7,527 from Regal under the Assignment and Right of First Refusal for the Fugitive Fee for the 5,474 tons of coal mined and sold from the Century Property at the rate of $1.375/ton agreed to in the Assignment.

2. Injunctive Relief

The Plaintiffs and Intervenor Foos Coal ask that the preliminary injunction issued by the United States District Court for the Northern District of West Virginia on January 12, 2005, be converted to a permanent injunction.[22] As to the preliminary injunction already issued, this arbitration proceeding between the Parties is the "trial on the merits" in accordance with Rule 65 of the Federal Rules of Civil Procedure. The United States Court of Appeals for the Fourth Circuit has held that permanent injunctive relief is appropriate where (1) there is no adequate remedy at law, (2) the balance of the equities favors the moving party, and (3) the public interest is served. *See* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). The West Virginia Supreme Court of Appeals has held that the following elements must be found for

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[22] Specifically, the Plaintiffs and Foos Coal asked for the following in their respective claims submissions:

a. Enjoining Dominick LaRosa from interfering with Virgil D. LaRosa, his companies and their subcontractors or sublessees in the operation of the 108-I (U-8-85) and the 106A (U-24-84) mines, and the mining, removal, preparation, shipping and sale of coal from said mines.

b. Enjoining Dominick LaRosa from terminating Virgil D. LaRosa's authority to operate under permits numbered U-24-84 (106A mine) and U-8-85 (108-I mine).

c. Enjoining Dominick LaRosa from terminating existing purchase orders obtained by Courtney F. Foos Coal Co., Inc., for coal mined, processed, shipped and sold from the permits numbered U-8-85 and U-24-84.

d. Enjoining Dominick LaRosa from interfering with future purchase orders that may be obtained by Courtney F. Foos Coal Co., Inc., for coal mined, processed, shipped and sold from the permits numbered U-8-85 and U-24-84.

e. Enjoining Dominick LaRosa from contacting clients of Courtney F. Foos Coal Co., Inc. with respect to coal purchase orders that have previously been obtained or that may be obtained in the future by Courtney F. Foos Coal Co., Inc.

f. Enjoining Dominick LaRosa from interfering with or preventing Virgil D. LaRosa from executing any MR-19 or other document in the name of Dominick LaRosa, individually and/or as President of Energy Marketing Company, Inc., that may be required by the West Virginia Department of Environmental Protection or other regulatory agency for the continued operation of the 108-I mine (U-8-85) and 106A mine (U-24-84) and the continued mining, removal, preparation, shipping and sale of coal from said 108-I and 106A mines, if Dominick fails, is incapable of or refuses to execute the same pursuant to the Preliminary Injunction Order.

g. Requiring Dominick LaRosa to discontinue interference with the coal supply for Foos Coal's contracts.

h. Requiring Dominick LaRosa to make available to Virgil D. LaRosa and Foos Coal the 1,000,000 tons of coal he agreed to supply over 15 to 20 years.

permanent injunctive relief: (1) existence of a right requiring protection, (2) an injury to that right, either sustained or anticipated, and (3) no adequate remedy at law. *See* City of Bluefield v. Taylor, 365 S.E.2d 51, 53 (W. Va. 1987). Further, both federal and state courts hold that the power to grant or refuse a permanent injunction is within the sound discretion of the trial court, according to the facts and the circumstances of the particular case. *See* Blackwelder Furniture; Baisden v. W. Va. Secondary Schs. Activities Comm'n, 568 S.E.2d 32 (W. Va. 2002).

The Panel found in Section II.C.1. above, that the Settlement Lease and Settlement Sublease are terminated by the cross-default provisions triggered by the Plaintiffs' failure to meet the minimum production requirements. Therefore, the request for a permanent injunction is moot. Although made moot by the default, the Panel also finds that the Plaintiffs and Intervenor did not meet their burden of proof to be granted a permanent injunction (even for the decidedly more narrow and limited scope requested at the closing arguments of this proceeding), especially in light of the significant change in circumstances since the granting of the preliminary injunction entered by the District Court in January 2005.

AWARD

a. The Panel finds that the Plaintiffs and Intervenor have not established the existence of a right requiring continuing protection.

b. The Panel finds that equitable relief to the Plaintiffs is not justified by the evidence and that an adequate remedy at law has been provided by the totality of this Panel's Award in this proceeding.

c. The Panel finds that the request for a permanent injunction is rendered moot due to the termination of the Settlement Lease and Settlement Sublease and other agreements which were part of the Settlement Agreement, as set forth at the Award for Section II.C.1. on page 34 at d.

d. Even without the termination of the Settlement Lease and Settlement Sublease, the Panel finds that the Plaintiffs and Intervenor have not met the burden of proof for a permanent injunction.

e. The Plaintiffs' and Intervenor's request for a permanent injunction is denied.

3. Piercing the Corporate Veil

Plaintiffs and Defendants both allege against one another that the corporate veil should be pierced and, in the Plaintiffs' favor, Dominick should be found personally liable, and in the Defendants' favor, Virgil D. should be held personally liable. The West Virginia Supreme Court of Appeals identified nineteen factors relevant to the question of corporate veil piercing in Laya v. Erin Homes, Inc., 352 S.E.2d 93 (W. Va. 1986).[23] However, the Court has also recognized

[23] The nineteen factors identified in Laya v. Erin Homes, Inc., are:
(1) commingling of funds and other assets of the corporation with those of the individual shareholders;
(2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);
(3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors;
(4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;
(5) failure to maintain corporate minutes or adequate corporate records;
(6) identical equitable ownership in two entities;
(7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);
(8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;
(9) absence of separately held corporate assets;
(10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;
(11) sole ownership of all the stock by one individual or members of a single family;
(12) use of the same office or business location by the corporation and its individual shareholder(s);
(13) employment of the same employees or attorney by the corporation and its shareholder(s);
(14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);
(15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;
(16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;
(17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;
(18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;
(19) the formation and use of the corporation to assume the existing liabilities of another person or entity.
Laya, 352 S.E.2d at 98-99.

that piercing the corporate veil is generally disfavored in a contract dispute as opposed to a tort action. Mills v. USA Mobile Comm., Inc., 438 S.E.2d 1, 5 (W. Va. 1993). In contract cases, "[t]he corporate veil may be pierced if the complaining party demonstrates: (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder." Id.

While Virgil D. and Dominick have at various times seemed to disregard corporate formalities, the Panel does not conclude that the corporate veil should be pierced in regard to either Plaintiffs or Defendants. In the first place, there is no written contract between the Parties, as discussed at length above, and therefore, the first element (requiring a frustration of contractual expectations) is not compellingly shown by either party. Moreover, the final element, fraud, has not been shown by either party.[24] Fraud requires a clear and convincing showing: "Fraud is never presumed and when alleged it must be established by clear and distinct proof." Syl. Pt. 5, Bennett v. Neff, 42 S.E.2d 793 (W. Va. 1947). While the Parties have alleged fraud against one another, no party has met the clear and convincing standard.

AWARD

a. The Panel finds that while the Parties did not always adhere to corporate formalities, the allegations of fraud by Plaintiffs and Defendants did not rise to the clear and convincing standard.

b. Plaintiffs' request to pierce the corporate veil against Defendants is denied.

[24] In West Virginia, the essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. Syl. Pt. 3, Kidd v. Mull, 595 S.E.2d 308 (W. Va. 2004).

c. Defendants' request to pierce the corporate veil against Plaintiffs is denied.

III. CONCLUSION

Attached to this Memorandum Opinion and Final Award as an Appendix is the Panel's calculations of damages based on its rulings as well as taking into consideration the monies previously paid as reflected by the evidence placed before the Panel. The Appendix includes the net monetary result of the Panel's rulings and reveals the calculations that arrive at the net sum due by Dominick's companies to Virgil D.'s companies based on the commercially reasonable findings and awards of the Panel. The Panel directs that the net amount of $336,480 be paid within thirty (30) calendar days of the date of this Memorandum Opinion and Final Award by any one or more of Dominick's companies to the Virgil D. company or companies specified by the Plaintiffs.

Respectfully submitted this 14th day of January, 2008.

Honorable Thomas E. McHugh, Arbitrator

Christopher B. Power, Esq., Arbitrator

F. Thomas Rubenstein, Esq., Arbitrator